IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. A-257

~~76-599~~

JOELLE FISHMAN, PETER GAGYI, GUS HALL AND JARVIS TYNER

Plaintiffs-Petitioners,

v.

GLORIA SCHAFFER, as Secretary of the State of Connecticut and EVELYN GOODWIN, Town Clerk of the Town of Litchfield

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The opinion of the United States District Court for the District of Connecticut is not yet reported. A copy of that opinion is attached hereto in the Appendix (A-1-16) by reference.

The Court of Appeals denied injunctive relief pending appeal September 14, 1976 but expedited the appeal. After oral argument on the merits September 24, 1976 the Court affirmed without opinion. A copy of the Court of Appeals orders are attached hereto in the Appendix (A-23-26) and incorporated herein by reference.

JURISDICTION

The Judgment of the United States District Court for the District of Connecticut was entered August 23, 1976. In it a three-judge court under Title 28 USC Section 2281 and 2284 dismissed the action on grounds not determining the constitutional merits. Appeal was taken September 3, 1976 to the United States Court of Appeals for the Second Circuit, which entered orders September 14, 1976 expediting the appeal but denying the application for injunctive relief pending appeal. Jurisdiction of the Court of Appeals was invoked under 28 USC Section 1291, the District Court having denied relief on grounds not reaching the constitutional merits MTM v. Baxley, 420 US 799 (1975).

The jurisdiction of this Court is invoked under Title 28 USC Section 1254 (1).

QUESTIONS PRESENTED

1. Did the District Court err in finding applicants barred by "laches" from the injunctive relief to which it found they were otherwise entitled?

2. Did the District Court err, in refusing to issue a declaratory judgment on the ground of laches?

STATUTES INVOLVED

Connecticut General Statutes, Chapter 153c (set out in full, A-27-30).

Title 28 U.S.C. Section 2201, 2202 (Declaratory Judgment Act).

STATEMENT OF THE CASE

Connecticut election law requires, for a successful campaign for a place on the ballot in November, that each petition be filed and verified before the Town Clerk for the town in which the signers reside, by the person (circulator) who witnessed the signatures. C.G.S. Sec. 9-453i and 453k. There are 169 towns in Connecticut (A-9). The petitions were to be filed by August 30, 1976 and the Town Clerks are given three weeks within which to verify signatures and send the verified signatures on to the Secretary of the State C.G.S. Sec. 9-453n. For a Presidential candidate to obtain ballot status 14,093 such signatures must be validated according to this procedure.

Petitioners are two petition circulators (Fishman and Gagyi) and the Presidential and Vice Presidential candidates of the Communist Party (Hall and Tyner), for whose candidacy Fishman and Gagyi circulated petitions. (A-9,10,21). Hall and Tyner were nominated by the Communist Party as its candidates February 18, 1976. (A-21). After their nomination Connecticut electors pledged to Hall and Tyner were promptly named. On February 20, 1976 Fishman and Gagyi, along with approximately thirty three other persons began to circulate petitions on their behalf. (A-10,21,22).

Appellants were aware of the complicated filing requirements of the Connecticut statute but hoped that by starting early they would be able to collect enough signatures to be reasonably sure of having 14,093 valid signatures without filing those of their petitions containing signatures of voters from small outlying towns. (A-21).

However, in June 1976 plaintiff Fishman, who is also the executive secretary of the Communist Party in Connecticut, realized that this might well not be the case, and began searching for counsel to challenge the procedures as constitutionally overburdensome. (Ibid. Pars 6,7).

On July 2, 1976 the complaint in this action was filed, claiming declaratory and injunctive relief against the burdensome portion of the Connecticut petition procedures, and "such other relief as law and equity may provide." A three judge court was convened as requested and on August 4, 1976 the case was heard.

The evidence, affidavits supporting cross motions for summary judgment, showed that the plaintiffs had collected about 17,500 signatures by July 30, 1976; well over the 14,093 signatures needed for ballot position with almost four weeks to go before the final filing date. Some petitions had been filed with the town clerks. From previous experience, however, all parties were aware that a number of signatures would be rejected by the town clerks. The plaintiffs wanted to use all of their remaining time to gather additional signatures.

By August 30 plaintiffs collected almost 25,000 signatures. They spent the last week before the filing deadline almost exclusively driving to the various town halls to attempt to comply with the challenged filing system, rather than collecting

additional signatures. About 12,000 signatures were eventually accepted, 200 were received by the Secretary of the State's office too late for counting, although filed on time under the statute, 1575 were not filed, and about 11,000 were rejected. A number of clerical errors were made in the rejections; although the precise number is not known, and no official review procedure exists; it appears to be in the vicinity of 1000 and may be considerably higher. These errors are the subject of pending litigation, Hall v Schaffer, Sup. Ct. N. H. Cty #150476. Thus the number of signatures which plaintiffs were unable to file because of the challenged procedure probably constituted the difference between the success and failure of their campaign.

At the hearing August 4 plaintiffs offered to comply with either of two alternative interim systems for filing the petitions: 1) filing them by mail under such certifications as the Court or Secretary might direct or 2) filing them with the Secretary of the State's office.(A-11,12).

Defendant Gloria Schafffer had filed an answer before hearing, setting up general and jurisdictional defenses. All parties moved for summary judgment, attaching affidavits. Defendant Schaffer did not plead a defense of "laches" nor did she offer evidence of relevance to such a defense at the August 4, hearing.

On August 19, 1976 the District Court ruled, finding that the statutory petition verification process was unreasonably and unneccessarily burdensome but denying both injunctive and declaratory relief on the stated ground that "No explanation was offered to indicate why (the plaintiffs) did not bring this case earlier, during a time when the state legislature, the body which must ultimately

choose which constitutional method should be employed, was in session." (A-14). Judgment was entered dismissing the action on August 23, 1976. On August 26, 1976 plaintiffs filed a motion for a new trial, under Rule 59, Fed.R. Civ. P., specifying the considerations which had led to the timing of the lawsuit. (A-18-22). On August 27, 1976 the District Court denied the motion without opinion.

Petition circulators Fishman and Gagyi and candidates Hall and Tyner appealed to the Court of Appeals for the Second Circuit, September 3, 1976. The defendant Secretary of the State of Connecticut did not file a cross appeal.

The Court of Appeals affirmed the District Court from the bench September 24, 1976. The circulators and candidates made prompt application to this Court, Marshall, Circuit Justice, for injunctive relief pending appeal. Justice Marshall denied such relief October 1, 1976, but noted that his opinion did not express approval of the District Court's denial of declaratory relief and that the petitions on that point could be pursued subsequently, not being barred by mootness.(Slip Op. 5, n.4). Justice Stewart also denied interim relief, October 4, 1976.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Petitioners Fishman, Gagyi, Hall and Tyner sumbit that the decision of the Courts below are in conflict with the controlling authority of Williams v. Rhodes, 393 U.S. 23 (1968). Further-

more, they raise important questions concerning the proper construction of and procedure under the Civil Rights Act, and the declaratory judgment act, and the availability of and practice regarding equitable defenses in such cases. For each of these reasons, and all of them, certiorari should be granted and this case fully heard; Rule 19 (1) (b), Supreme Court Rules.

I. THE DISTRICT COURT HOLDING THAT THE CIRCULATORS AND CANDIDATES WERE BARRED BY LACHES CONFLICTED WITH THE APPLICABLE DECISIONS OF THIS COURT.

Laches is an equitable defense available to a party prejudiced by the unreasonable delay of an opposing party in asserting and/or suing to vindicate rights after those rights have been established. As Justice Brandeis put it:

> ... The essence of laches is not merely lapse of time. It is essential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy...Nor does failure, long continued, to discover the appropriate remedy, though well known, establish laches where there has been due diligence and, as the lower courts have found, the defendant was not prejudiced by the delay. Southern Pacific Railway Co. v Bogert, 250 U.S. 483, 488-490.

The District Court here did not discuss the elements of laches but relied on two notions:

(1) that "no explanation was offered to indicate why they did not bring this case earlier, during the time when the state legislature ... was in session." (A-14). and 2) that "striking diwn the present method at this time ... would leave the State with no protection at all." (A-14,15).

Plaintiffs submit they could not have brought the case earlier, that the state legislature schedule is of no relevance to a defense of laches, that the state's interests were quite adequately protected by the system which would have remained had the court enjoined the burdensome parts, and other emergency methods exist for protection of those interest through promulgation of an emergency regulation. In addition both considerations listed by the Court have no bearing on their pray prayer for declaratory relief.

The District Court suggested that the plaintiffs should have brought suit at some time after the 1974 election. The Court overlooked the fact that plaintiffs could not have filed this action until at least February 20, 1976. Candidates Hall and Tyner were not nominated until February 18, 1976. Plaintiff Fishman did not begin to organize the Party's effort to secure a ballot position until after the nomination and she could not have circulated the petitions until after that time. It could not have been known who the petition circulators would be until the petition campaign was initiated. It was not necessary under any other statutes to begin at an earlier date, and any

statute requiring that the petition campaign occur even as early as February might well be unconstitutional. See Salera v. Tucker 399 F Supp 1258 (ED Pa, 1975) aff'd ___ US ___ 96 SCt 1451.

It is therefore dubious that a "case or controversy" was presented prior to plaintiffs' taking out petitions February 20, 1976. O'Shea v. Littleton 414 US 488 (1974) U.S. v. SCRAP 412 US 687 Socialist Labor Party v. Gilligan 406 US 583 (1972) Mitchell v. Donovan 300 F Supp 1145, remanded, other grounds 398 US 427 (1970). Certainly standing is a sufficiently complex and uncertain area to justify a litigant's waiting until he is reasonably certain to have standing. See e.g. Warth v. Seldin 422 US 490 (1975). It follows that plaintiffs cannot be guilty of laches unless they delay unreasonably and prejudicially after facts relevant to the controversy are known.

The controversy was not ripe for judicial intervention until the time this action was brought. Although plaintiffs took out and began to collect signatures on petitions in February, it was only later that it appeared likely that the burdensome filing requirements might make the difference between failure and success. The facts upon which the District Court relied in its opinion could not have been known had the action been filed earlier.

And even if the action had been filed the day after the plaintiffs took out petitions, it would not, in all probability have been heard and determined in time for the state legislature to act, the course the court proposed to the plaintiffs. This Court may take judicial notice that Connecticut's legislature adjourned May 5, 1976. (West Pub Co, 1976 Connecticut Legislative Service, Vol 5).

In deciding that plaintiffs were barred from otherwise appropriate relief by the "laches" doctrine, the District Court neglected to mention the leading case, Williams v. Rhodes 393 US 23 (1968), which is on all fours and requires reversal.

In Williams, Independent presidential candidate George Wallace had contacted the Ohio Secretary of State in 1964 and several times in 1967 concerning his desire to gain ballot status. Wallace had been briefed on the requirements of Ohio election law early. He had formally requested a place on the ballot in April, 1968. But he had waited until July 29, 1968 to file suit. The District Court, presaging Judge Blumenfeld's opinion here, held that Wallace was barred by laches, ruling on August 29, 1968, from seeking equitable relief by his delay in filing suit; 290 F Supp 983 (SD Ohio, ED). This Court reversed. Initially, Justice Stewart granted an injunction pending appeal, in chambers, 21 LE2d 69 (September 10, 1968), placing Wallace on the Ohio ballot without proof that any of the 450,000 signatures his organization had collected were valid. The full court granted an early hearing and ordered Wallace put on the Ohio ballot October 15, 1968; Williams v. Rhodes 393 US 23. In rejecting Ohio's claim that a constitutional deference to the legislative branch required the Courts to withhold relief, the majority squarely rejected the notion relied on by the lower courts in this case that plaintiffs should be relegated to the legislature.

The Court also reversed the District Court's holding that plaintiffs were barred from equitable relief by laches, albeit sub silentio.

Here, reversal must follow a fortiori. Plaintiffs filed the instant lawsuit on July 2, 1976, compared with the Wallace Party's July 29, 1968 filing. They have diligently pursued every remedy

open to them and offered a complete explanation of their considerations in the timing of the case.

Despite as diligent a search as has been possible to conduct, counsel has not found a scintilla of law supporting the District Court's relation of the state legislature's schedule with the plaintiffs' alleged laches. "Due diligence" does not require litigants to go to the legislature. The legislature would not have ben under any obligation to consider proposals made by the plaintiffs and there was no question of abstention because the state statute was perfectly clear in its requirements. Nor, as the facts alleged in the verified motion for new trial and application for injunction pending appeal make clear, did the timing of the lawsuit constitute an acquiescence in the statutory scheme.

Under Williams and the recent opinion of Justice Powell in McCarthy v Briscoe (September 30, 1976), the petitioners exercised due diligence; they can not be charged with laches. This Court should grant the petition and reverse the District Court's unauthorized misapplication of the doctrine; remanding for full consideration of the petitioners' constitutional claims.

II. WHETHER THE LOWER COURTS ERRED IN DENYING INJUNCTIVE OR AT LEAST DECLARATORY RELIEF PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

A. THE DISTRICT COURT MISAPPLIED THE DOCTRINE OF LACHES TO PRECLUDE RELIEF IN THIS CASE.

The application of the doctrine of "laches" as an equitable defense on the merits is, of course, a matter of federal law in this case, Southern Pac Ry Co v Bogert 250 US 483, Abbott Laboratories v Gardner 387 US 136 (1967). In determining whether and how the doctrine should be applied, federal courts may reasonably draw on general and state practice where relevant.

In ruling that the Communist Party circulators and candidates were guilty of laches because they did not bring this action at a time when the state legislature would be in session after relief was granted, the District Court in this case created and applied a wholly new notion in federal law: what might best be termed a requireement of exhaustion of legislative remedies.[1] (A-14).

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[1] The District Court in the Williams case did something somewhat similar, but relied on Article II, Section 1 of the Constitution which specifically grants some power in this area to state legislatures. This court, of course reversed on that point, 393 US at 29 (1968). In the present case the court sought the same result purely as a matter of federal equity doctrine.

It did so citing dicta from two decisions of this Court which are wholly inapposite to a ballot access case: neither of them concerned laches nor was either brought under the civil rights act.

And the District Court applied this notion indiscriminately to claims for both injunctive and declaratory relief. Counsel knows of no analogous doctrine under any state practice. Rather the idea seems to have been cut from whole cloth merely to deny all relief in this case. It should not be left unreviewed by this Court.

In addition the District Court misapplied existing law in several respects, conflicting in important ways with decisions of this Court and with decisions of other lower courts.

1. Laches is an affirmative defense and must be pleaded and proven by the party asserting it Baker v. Nason 236 F2d 483 (5th Cir., 1956) Pascale v. Zoning Board of Appeals of New Haven 186 A2d 377 (Conn. Supreme Court, 1962). Here the defendant did not raise the defense by answer and produced no facts to support it.

2. To be guilty of laches, plaintiffs would have to have failed to exercise due diligence after their right of action had fully accrued. Costello v. United States 365 US 265 (1961); U.S. v. Northern Pacific Railway Corp. 169 FSupp 735 (D. Wyo. 1959), Lubin v Lubin 302 P2d 49 (Cal. App. 1956), Mulholland v. Pittsburgh National Bank 174 A2d 861; 30 CJS Equity Sec.121. Here plaintiffs probably lacked standing to sue until February 20, 1976 when they took out petitions, and the facts which proved that the burdens placed by the challenged statutes were unreasonable did not emerge until later.

3. To be guilty of laches, plaintiffs must have had actual knowledge of the facts on which their claims rested and delayed unreasonably after such knowledge. Polaroid Corp. v. Polarad Electronics 287 F2d 492 (2d Cir., 1961) cert den'd 368 US 20.

But see Chandon Champagne Corp. v. San Marino Wine Corp. 353 F2d 531 (2d Cir., 1964) (special circumstances requiring exception to general rule.) Again, the facts in this case are still emerging.

4. To be guilty of laches a party must not only have delayed unreasonably but the party asserting the defense must have relied on the inaction to its detriment. Akers v. State Marine Lines 344 F2d 217 (5th Cir. 1964), General Electric Co. v. Sciaky Bros. 187 FSupp 667 (E.D. Mich., 1960), James McWilliams Blue Line v. Esso Standard Oil Co. 145 FSupp 392 (SDNY, 1956) Mutual Life Ins Co. v. Simon 151 FSupp 408 (SDNY, 1957). Here the claimed prejudice or detriment would result solely from the court's refusal to order the appropriate relief and not from the timing of the plaintiffs' lawsuit. Prejudice is not mere loss, "but that delay has subjected (the defendant) to a disadvantage in asserting and establishing his claimed...defense." Akers, supra at 220. Defendants have not claimed any difficulty in defending at any point in the proceedings.

5. There is authority for the proposition that in a civil rights act case the District Court lacks discretion to deny relief where it finds the plaintiff to have established a right at trial, and relief is necessary to implement that right; Sostre v. Rockefeller 312 FSupp 863, 884 (SDNY 1970) (Motley, J) revd in part, other grds 442 F2d 178, 404 US 1049, Henry v. Greenville Airport Commission 284 F2d 631 (4th Cir., 1960).

B. EVEN IF INJUNCTIVE RELIEF WERE PROPERLY WITHHELD, IT WAS ERROR TO DENY DECLARATORY RELIEF UNDER THE FACTS OF THIS CASE.

The Court has often noted that different considerations may govern prayers for injunctive and

declaratory relief even where the two may arise from the same set of facts. Such is the case here. See e.g. Steffel v. Thompson 415 US 452 (1974). The errors petitioners, circulators and candidates have argued above, equally infect the District Court's denial of both forms of relief; the additional considerations which follow, however, make plain that that error was even more serious as to their prayer for declaratory relief.

The Court assigned no reason distinguishing its denial of injunctive relief from its denial of declaratory relief. The bulk of its analysis as to relief was, nonetheless, plainly irrelevant to a declaratory judgment. The alleged confusion and darkness into which an injunction would have plunged the state at an inopportune time simply would not attend a declaratory judgment. The alleged "prejudice" to the public interest which was necessary to ground the laches defense bore solely on the prayer for injunctive relief. Nor does the legislative schedule bear any obvious or articulated relevance to a prayer for declaratory relief. Indeed what the District Court did say amounted essentially to a declaration without a judgment.

Under the circumstances, it is hard to see the denial of declaratory relief as based on any considerations other than "whim or personal disinclination". Public Affairs Associates v. Rickover 369 US 111,112 (1962). In this connection, it is hard for counsel to ascribe the total absence of any consideration of their clients' interests throughout the District Court's opinion explaining its denial of relief, to anything other than personal prejudice against their clients. Although it is obviously in the public interest that candidates who demonstrate substantial support appear on the ballot, the

District Court saw only the Secretary of the State's narrow administrative concerns as embodying the public interest. (Op, passim).

The District Court plainly refused to fulfill its "duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction" Zwickler v. Koota 389 US 241,254 (1967). The remainder of the District Court opinion, which extensively and persuasively discusses the merits of the constitutional issues, indicates quite clearly that no "avoidance of constitutional adjudication" motivated the refusal to issue declaratory relief.

Considerations of federalism do not here militate against federal intervention and this is a case brought under the civil rights act. See Williams v. Rhodes 393 US 23 (1968) McCarthy v. Briscoe __US__ (September 30,1976) (Powell, J, in chambers). The Court's second holding in Steffel will thus require reversal here:

> ...engrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate....The only occasions where this Court has disregarded these "different considerations" and found that a preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases in which principles of federalism militated altogether against federal intervention into a class of adjudications...When

> federal claims are premised on 42 USC Sec. 1983 (42 USCS Sec 1983) and 28 USC Sec.1343 (3) (28 USCS Sec. 1343(3))- as they are here - we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights...But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution has been commenced. Steffel v. Thompson 415 US at 471, 3.

The lower courts' denial of declaratory relief in this case conflicts with applicable decisions of this court. The petition for a writ of certiorari should be granted.

CONCLUSION

The lower courts' denial of injunctive relief on the basis of "laches" conflicts with applicable decisions of this Court and constitutes a drastic departure from general federal and state court interpretations of the laches doctrine which should be reviewed by this Court. And the lower courts' denial of declaratory relief similarly constitutes an abuse of their discretion under the Declaratory Judgment Act, conflicting with this Court's guidelines for the exercise of the power to issue such judgments. As these are important matters of practice in cases arising under the civil rights act, the petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted and the judgment accepted for plenary consideration.

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOELLE FISHMAN, ET AL. :

v. : CIVIL NO. H-76-263

GLORIA SCHAFFER, in her Official Capacity as Secretary of State of the State of Connecticut, ET AL. :

BEFORE: Meskill, Circuit Judge, Blumenfeld and Newman, District Judges

MEMORANDUM OF DECISION

BLUMENFELD, District Judge:

I. The Plaintiffs' Challenge

The case before us was filed in the District Court of Connecticut at Hartford on July 2, 1976. Since it seeks a declaratory judgment and an injunction against the enforcement of certain provisions of Connecticut's election laws on the ground that they are unconstitutional, the provisions of 28 U.S.C. Sec.2281 required that the matter be heard and determined by a three-judge court. Because of the time pressures involved in this matter, as will later more fully appear, the case was advanced on the docket for hearing on August 4, 1976.1/

1/ The case has been submitted to the court on the complaint, answer, and cross-motions for summary judgment, each of which are supported by affidavits, and both parties have agreed that the hearing shall be treated as one on the merits under Rule 65(a)(2), Fed.R. Civ. P.

The cause of action and the court's jurisdiction are properly asserted under Title 42 U.S.S. Sec. 1983 and 28 U.S.C. Sec. 1343 (3).

It is the contention of the plaintiffs that a specific portion of Connecticut's election laws relating to the right of an individual to stand for election to public office and have his name listed on the ballot is so unreasonably burdensome as to be constitutionally invalid.1/The plaintiffs challenge only one element of Connecticut's system of qualifying potential condidates for public office for a place on the ballot by use of a nominating petition signed by electors; they do not, and could not, challenge the limitation of candidates in and of itself, for as the Supreme Court has noted:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot--the interest, if no other,in avoiding confusion, deception, and even frustration of the democratic process at the general election."

Jenness v. Fortson, 403 U.S. 431, 442 (1971).

A brief description of what Connecticut requires in order to demonstrate that "significant modicum of support" will serve to place the plaintiffs'

2/ The requirements of the several states are concisely listed in Developments in the Law of Elections, Harv. L. R.1111, at 1124-25 n.11 (1975).

claim into sharper focus. Connecticut has one of the least demanding schemes for enabling potential candidates to gain a place on the ballot.3/ Potential candidates need to submit petitions signed by electors equal to only one per cent of the number who voted for the same office in the previous election. Immediately after the previous statewide elections, the forms on which to have these signatures made may be obtained from the Secretary of the State. Thereafter the signed petitions may be submitted by the circulators who obtained them to the town clerks where the signers reside until nine weeks before the next election. At the time that person submits them he or she must sign a statement certifying the authenticity of the signatures in the presence of the town clerk. This gives a potential candidate a maximum of more than 21 months to obtain and file the necessary petition signatures. Incidentally, it may also give him or her a substantial headstart in campaigning since party candidates are not nominated until more than a year later.

That both the numerosity requirements and the time in which to satisfy them are markedly more favorable to the potential candidate in Connecticut than are constitutionally required, readily appears in light of recent Supreme Court decisions.4/ Measured against the pattern of the foregoing

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3/ Conn. Gen. Stat. Ann. Secs.9-453a to 9-453s (1976 Supp.) / A-27-31/

4/ In Storer v. Brown, 415 U.S. 724 (1974) a challenge to the constitutionality of California's statute regulating qualifications of independent candidates was considered. In California, petition

decisions, we do not hesitate to say that for the purpose of demonstrating that a would-be candidate has "a significant measurable quantum of community support," American Party of Texas v. White, 415 U.S. 767, 782 & n. 14, Connecticut's election laws

4/ cont'd.

signatures must equal five per cent of the total vote cast in the previous election, but the pool from which signers may be obtained excludes those who voted in the primary, and petitions may not be circulated until approximately two months after the primary. Instead of sustaining or striking down California's scheme, the Court directed the district court to find out what percentage the required 325,000 would be when measured against the available pool (total votes cast in 1972 less those who voted in the preceding primary) and then to decide whether a "reasonably diligent" candidate could be expected to meet the requirements. 415 U.S. at 738-40.

And in Jenness v. Fortson, 403 U.S. 431 (1971), Georgia's requirement that independent candidates obtain signatures from five per cent of the voters in 180 days, and pay a filing fee equal to three per cent of the annual salary of the office sought, were held not to place a burden on first amendment rights and therefore did not require special justification. 403 U.S. at 440.

Finally, in American Party of Texas v. White, 415 U.S. 767 (1974), where the Court realistically balanced the burden imposed by a time limitation for obtaining a specific number of signatures against the state's interest in a demonstration of a fair measure of voting support, the Court stated:

impose no constitutionally impermissible burden on the plaintiffs in those respects.

Having matched those two substantive elements in Connecticut's access-to-the-ballot scheme against similar ones in Georgia, Texas and California which

4/ cont'd.

> "Neither do we consider that the 55 days is an unduly short time for circulating supplemental petitions. Given that time span, signatures would have to be obtained only at the rate of 400 per day to secure the entire 22,000, or four signatures per day for each 100 canvassers--only two each per day if half the 22,000 were obtained at the precinct conventions on primary day. A petition procedure may not always be a completely precise or satisfactory barometer of actual community suuport for a political party, but the Constitution has never required the States to do the impossible. Dunn v. Blumstein, 405 U.S. 330, 360 (1972). Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization. Constitutional adjudication and common sense are not at war with each other, and we are thus unimpressed with arguments that burdens like those imposed by Texas are too onerous, especially where two of the original party plaintiffs themselves satisfied these requirements."

415 U. S. at 786-87 (footnote omitted).

A similar assessment was made by the Court in Storer v. Brown, 415 U.S. 724,740:

"Standing alone, gathering 325,000 signatures

the Supreme Court has upheld as constitutionally permissible,[5/] we find Connecticut's to be substantially less restrictive. However, our inquiry

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in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day. On its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President. But it is a substantial requirement; and if the additional likelihood is, as it seems to us to be, that the total signatures required will amount to a substantially higher percentage of the available pool than the 5% stipulated in the statute, the constitutional claim asserted by Hall is not frivolous. Before the claim is finally dismissed, it should be determined whether the available pool is so diminished in size by the dissqualification of those who voted in the primary that the 325,000-signature requirement, to be satisfied in 24 days, is too great a burden on the independent candidates for the offices of President and Vice President."

5/ See note 4 supra.

does not end because of our determination that the overall effect of Connecticut's scheme is not violative of the Constitution, for as the Court demonstrated in American Party of Texas it is necessary to analyze each of the restrictions separately to determine whether they make qualification impermissibly burdensome.[6/]

We turn therefore to the requirement that the signatures on the petition must be authentic.

There is no doubt that qualifications may be imposed upon those who sign a petition to ensure that only eligible persons may sign, and that they sign only once. The plaintiffs do not dispute that provisions to effect such qualification are justifiable because of the State's compelling interest in "preservation of the integrity of the electoral process." American Party of Texas v. White, 415 U.S. at 782 & n. 14. To safeguard that interest a requirement that "all signatures evidencing support for the party whether originating at the precinct conventions or with supplemental petitions circulated after primary day must be notarized" was held valid in American Party of Texas , 415 U.S. at 787. Indeed, the plaintiffs do not question the State's right to require proof of the authenticity of the signatures on the petition. What they challenge is the required method for proving their authenticity.

6/ While "all procedures used by a state as an integral part of the election process must pass muster against charges of discrimination or abridgement of the right to vote," Moore v. Ogilvie, 394 U.S. 814, 818 (1969), yet "not every limitation or incidental burden on the exercise of voting rights is subject to a strict standard of review." Bullock v. Carter, 405 U.S. 134, 143 (1972) citing McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969).

Specifically their challenge is aimed at only those petitions of Conn. Gen. Stat. Ann. Secs. 9-453i and 453k (1976 Supp.) underlined below which require that:

1. "Each page of a nomination petition shall be submitted by the person who circulated the same to the town clerk of the town in which the signers reside...." Sec. 9-453i (1976 Supp.).

2. "The town clerk shall not accept any page of a nominating petition unless the circulator thereof signs in his presence the statement as to the authenticity of the signatures thereon required by section 9-453j." Sec. 9-453k(a) (1976 Supp.)

3. "The town clerk shall certify on each such page that the circulator thereof signed such statement in his presence and that either he knows the circulator or that the circulator satisfactorily identified himself to the town clerk." Sec. 9-453k(b) (1976 Supp.).

Other portions of the statutes so far as relevant are set out in the margin.7/ To further refine

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7/ Section 9-453i (1976 Supp.);

"Each page of a nominating petition shall be be submitted by the person who circulated the same to the town clerk of the town in which the signers reside at least nine weeks prior to the election."

"...Each page of a nominating petition submitted to the town clerk and filed with the secretary of the state under the provisions of sections 9-453a to 9-453s, inclusive, or section 9-216 shall contain a statement as

their claim, the plaintiffs do not challenge the requirement that the circulator shll sign a statement under penalty of perjury that each signer of the petition (1) signed the petition in his or her presence, and (2) that he or she either knows the signer, or, that the signer satisfactorily identified himself or herself to the circulator.

Singled out as being unconstitutionally burdensome is the requirement that the circulator must sign the required statement before the town clerk in each town where any petition signer resides. In their brief the plaintiffs have explained that burden as follows:

"Section 9-453k would require that if, for example, a petitioner gathered signatures in 100 towns, he would have to make a personal appearance before the Town Clerk in each of those towns in order to have those signatures validated. If each of the approximately 30 circulators on behalf of Hall and Tyner were to gather signatures from all 169 towns in the State of Connecticut then each of those circulators would have to make a personal appearance before the Town Clerk of each of the individual towns. The circulators on

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7/cont'd.

to the authenticity of the signatures thereon, signed under penalties of false statement, by the person who circulated the same, setting forth such circulator's address and the town in which such circulator is an elector and stating that each person whose name appears on such page signed the same in person in the presence of such circulator and that either the circulator knows each such signer or that the signer satisfactorily identified himself to the circulator...."

behalf of Hall and Tyner have found that it would be impossible, in their estimation, to gather the proper number of signatures and at the same time insure that they can file each of the signatures that they have gathered before the requisite Town Clerk. Because of the time limitation, that is the requirement that petitions be submitted nine weeks prior to the election, it is a distinct possibility that signatures gathered from outlying communities will not be submitted to the Town Clerk of those communities. This practical consideration, which is forced upon the plaintiffs because of the statutory requirement, limits the right of the petitioner in the outlying towns to have his or her voice heard in determining who is to be placed on the presidential ballot."

To support their claim that the above imposes a constitutionally impermissible burden on the right of an individual to stand for election, the plaintiffs have submitted some uncontested affidavits. In substance these affidavits submitted by the plaintiffs disclose that during the year 1976 Peter Gagyi has been circulating a petition on behalf of plaintiffs Gus Hall and Jarvis Tyner, who are attempting to have their names placed on the 1976 ballot as candidates for President and Vice President of the United States respectively. On July 24 he had petitions signed by 213 "electors or residents" of 41 Connecticut towns which he collected on weekends and off hours. He works in Danbury on Monday through Friday from 7 a.m. to 4 p.m. If he had to file these signed petitions in compliance with the statutes he would have to go to 41 towns and would thereby lose time from work. Joelle Fishman, also acting as a circulator for Gus Hall and Jarvis Tyner during the year 1976, on July 25 had on had, yet unfiled, 773 signatures to be

filed in 117 towns. Robert Ekins' affidavit attests that he is a member of the State Central Committee of the Communist Party of Connecticut and in charge of circulating petitions on behalf of Gus Hall and Jarvis Tyner. Coordinated reports from 25 of 33 circulators of petitions who have assisted him indicate that 16,727 signatures have been obtained; 4,839 of those have been validated. The remainder are classified as 6,089 "on hand" and 5,079 as "other unfiled." The number of validated signatures needed to get on the ballot is 14,093.

Subjecting the challenged signature authentication provisions to "a careful examination on our part," McDonald v. Board of Election Commissioners, 394, U.S. 802 (1969), we note that they have a positive as well as a negative aspect. Connecticut's law does not require individual notarization of each signature, as it might, see American Party of Texas, 415 U.S. at 787. Instead of having a notary present to take an acknowledgement from each and every petition signer, the challenged provisions require only that a statement by the circulator, signed in the presence of the town clerk of the town where the signer resides, that (1) the signer signed in his presence, and (2) that either he knew the signer, of that he satisfactorily identified himself to the signer. While we are not called upon to decide whether one statement signed by the circulator in the presence of the relevant town clerk is a method for access to the ballot less restrictive than one which would require the notarization of each signature on a petition, we are inclined to think that it is more lenient.

This brings us finally to the plaitiffs' contention that the signature authenticity burden would be significantly lighter if the circulator's statement could be signed in the presence of any disinterested public official rather than in the presence of the town clerk in every town where a signer resides. They suggest that this should be required only once either in the presence of the

town clerk where the circulator resides, or before an official in the office of the Secretary of the State.[8/]

At the hearing, counsel for the State conceded that the suggested method would serve its interest in the integrity of the petition signatures as well as the present method which requires the circulator to make the statement before the town clerk. But even if the State were to be held to that concession, the petition pages would still have to be delivered to each relevant town clerk for the purpose of having the signatures checked. The plaintiffs recognize the reasonableness of a requirement that the petition must be filed with an official at the time it is authenticated and left in his custody to protect against the possibility of anyone tampering with it, and alsothat the signatures and addresses on it must be checked against the last completed registry list, Conn. Gen. Stat. Ann. Sec. 9-453j, 453k and 4531 (1976 Supp.), for the purpose of rejecting any name not on that list. The plaintiffs argue that the petitions' delivery could be effected by mailing the petitions, together with the circulator's signed statement of authenticity, to the town clerks to have the signatures on them checked against the registry lists, rather than requiring the delivery of them to be made by the circulator in person.

8/ Although a personal appearance at the Secretary's office in Hartford might necessitate a longer trip to authenticate a petition signed by a resident in Norwalk, obtained by a circulator from neighboring Stamford, a circulator would need to make only one trip to file petitions signed by residents of several different towns instead of separate trips to each town.

To accommodate the State's argument that the petition, once authenticated, should remain thereafter in official hands to safeguard against possible fraud, the plaintiffs state that they would be willing to provide suitably stamped and addressed envelopes in which the Secretary could mail them to the appropriate town clerks to be checked. We notice that almost all other documents required to be filed with officials may be delivered for filing by mail.

Having reduced the issue solely to whether the burden imposed by the requirement that each circulator must deliver each signed petition in person to the town clerk in the town where the signer resides is constitutionally permissible, we must decide what test to apply.

The parties do not agree upon what is the applicable rule, but we find it enunciated in American Party of Texas, 415 U.St. at 780:

> "We agree with the District Court that whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations...their validity depends upon whether they are necessary to further compelling state interests."

The rule provides

> "no litmus paper test...(and) is not self executing....The facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification must be considered."

Storer v. Brown, 415 U.S. at 730. We think it is probable that the interest of the State in having the petition papers and the circulators' signed statement relating to the signatures on them

delivered to town clerks in the 169 towns throughout the State "may be served equally well in significantly less burdensome ways." See American Party of Texas, 415 U.S. at 781. The overall integrity of the access-to-the-ballot scheme would not be adversely affected if the Secretary of the State, or some other official connected with the election process who is centrally located were designated to receive and then mail the petitions to the relevant town clerks. The contention of the defendants that such a method would add significantly to the duties of already overworked officials is not supported by any showing of facts; and, if one were attempted, we think it would be too sparse to justify the burden presently being borne by the plaintiffs. We do not, however, find it necessary to rule on the merits of this action, since we find the plaintiffs barred by the equitable doctrine of laches.

II. Equitable Considerations

The plaintiffs have had since the election in November of 1974 to bring this suit. The particular reason that led the plaintiffs to bring this action is not one which just cropped up. Indeed, they failed in their effort to qualify for a position on the ballot in that prior election. No explanation was offered to indicate why they did not bring this case earlier, during a time when the state legislature, the body which ultimately must choose which constitutional method should be employed, was in session.

As we have stated, on the limited record before us it would seem that "the vital state objectives.. (could) be served equally well in significantly less burdensome ways." American Party of Texas, 415 U.S. at 781. Nevertheless, our striking down the present method at this time would not provide for a less burdensome one but would leave the State

with no protection at all. We are not disposed to exercise our equitable powers in a way "which may be prejudicial to the public's interest." United States ex rel. Greathouse v. Dern, 289 U.S. 352, 360 (1933). By affording the legislature a reasonable opportunity to devise a significantly less burdensome method, we heed the Supreme Court's admonition in Burford v. Sun Oil Co.,319 U.S. 315, 334 (1943), that "a sound respect for the independence of state action requires the federal court to stay its hand." We are satisfied that the refusal to exercise our equitable discretion to declare the challenged provision violative of the Constitution will not be read to mean that it is sanctioned. It has been demonstrated more than once that Connecticut's legislature acts promptly to afford suitable protection to the constitutional rights of its citizens when the need therefor is called to its attention.9/

In light of this experience, we have no hesitation in deciding that, because the unexplained and unjustifiable delay on the part of the plaintiffs in initiating this action has created a situation which makes it impossible for this court to afford relief and at the same time safeguard the legitimate interest of the State of Connecticut, our discretion should be exercised to deny equitable relief in the nature of either an injunction or a declaratory judgment. The action is therefore dismissed.

9/ Most recently, following a federal decision in Tedeschi v. Blackwood, 410 F. Supp. 34 (D. Conn. 1976) (3-judge court), which struck down the Connecticut automobile towing and lien statute, the state legislature was quick to respond with corrective legislation. See Conn. Gen. Stat. Ann. Sec. 14-150, as amended, P.A. 76-402 (June 9, 1976).

SO ORDERED.

Dated at Hartford, Connecticut, this 19th day of August, 1976.

s/
Thomas J. Meskill, U.S. Circuit Judge

s/
M. Joseph Blumenfeld, U. S. District Judge

s/
Jon O. Newman, U. S. District Judge

"Filed August 19, 3:35 P.M. '76: Clerk U. S. District Court, Hartford, Conn."

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOELLE FISHMAN, ET AL	)	
	)	
v.	)	CIVIL NO. H-76-263
	)	
GLORIA SCHAFFER, in her Official Capacity as Secretary of State of the State of Connecticut, ET AL	)	

J U D G M E N T

This cause having come on for a hearing on the merits before a three-judge District Court, convened pursuant to 28 U.S.C. Sections 2281 and 2284, and the Court having filed its Memorandum of Decision on August 19, 1976, dismissing this action,

It is ORDERED AND ADJUDGED that this action be and is hereby dismissed on the merits, with costs to the defendants.

Dated at New Haven, Connecticut, this 23rd Day of August, 1976.

Sylvester A. Markowski

Clerk, United States District Court

Bys/ Frances J. Consiglio
Deputy in Charge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOELLE FISHMAN, ET AL	:	
	:	
Plaintiffs	:	
	:	
VS.	:	No. H-76-263
	:	
GLORIA SCHAFFER, ET AL	:	
	:	
Defendants	:	

MOTION FOR NEW TRIAL

Plaintiffs move under Rule 59(a)(2) of the Federal Rules of Civil Procedure for a new trial and/or rehearing of motion for summary judgment.

This motion is predicated on facts included in the attached affidavit, some of which facts were not before the court when the memorandum of decision was written because no claim of laches was raised by the defendants on or before hearing.

Plaintiffs respectfully represent:

1. They could not have brought this action at a time permitting subsequent legislative action before the filing deadline for the 1976 general election. Plaintiffs Hall and Tyner were nominated only February 18, 1976. Petitions on their behalf were requested February 20, 1976 and a petition campaign organized after that date.

The facts upon which the court relies in its opinion became known, and the relevance of the constitutional claims made to the 1976 petition campaign for plaintiffs Hall and Tyner became certain only at the time the present action was filed.

2. The plaintiffs in all probability lacked standing and their interest was probably insufficient to present an actual case or controversy until after petitions were taken out February 20, 1976. Thus the claim that plaintiffs are barred by laches is not supported by any failure to seek judicial relief between November, 1974 and February, 1976.

3. The Court's conclusion that to strike the unduly burdensome clauses by injunction would leave the state without statutory protection to insure the validity of signatures is unsupported by the facts. Plaintiffs Fishman and Gagyi and others similarly situated could sign the verifications before any disinterested person empowered to administer oaths and forthwith submit petitions to the Town Clerks by mail. Plaintiffs Hall and Tyner can comply with such other methods to prove that the petitions were not tampered with after the verification and before mailing as the Court may direct including submission of an affidavit by the custodian of such petitions that no tampering had occurred.

4. The balance of equities tips sharply and decisively in plaintiffs' favor.

5. Plaintiffs intend to comply with the procedure outlined in paragraph 3 supra so that all signed petitions will reach the relevant Town Clerks by August 30, 1976 and render retroactive relief effective.

Even if the Court should refuse to reconsider or having reconsidered continues to find the plaintiffs barred in seeking relief as to the 1976 election by the doctrine of laches, plaintiffs request reconsideration of their claim for declaratory relief and represent that they or their successors in interest

will, in all probability, seek to petition for a place on the ballot in 1978 and/or 1980 and that their present experience leads them to believe that the same obstacles would prove equally burdensome at that time.

PLAINTIFFS

BY s/_____

FRANK COCHRAN
Connecticut Civil Liberties
Union Foundation, Inc.
57 Pratt St.
Hartford, Ct. 06103

HOWARD GEMEINER
JOHNSON AND GEMEINER
152 Temple St.
New Haven, Ct. 06510

THEIR ATTORNEYS

This is to certify that on the 25th day of August, 1976 copies of the foregoing were mailed, postage prepaid to Daniel Schefer, Esq., Assistant Attorney General, 30 Trinity Street, Hartford, Conn. and David Losee, Esq., Connolly, Holtman and Losee, 4 No. Main St., West Hartford, Conn.

s/ Frank Cochran

AFFIDAVIT

State of Connecticut
ss at New Haven, August, 1976
County of New Haven

I, Joelle Fishman, being first duly sworn, depose and say

1. I am over the age of eighteen (18) and know and believe in the obligation of an oath.

2. I am and at all relevant times have been Executive Secretary of the Communist Party of Connecticut, which is affiliated with the Communist Party of the United States.

3. On Feburary 18, 1976 the Communist Party of the United States of America nominated Gus Hall as its candidate for President of the United States and Jarvis Tyner as its candidate for Vice President of the United States.

4. On February 20, 1976 the Communist Party of Connecticut requested nominating petitions from the Secretary of the State in Hartford in order to circulate such petitions in our effort to place Hall and Tyner on the ballot in Connecticut.

5. Initially we had hoped to secure sufficient signatures on nominating petitions from voters residing in a small number of large towns, but as our campaign progressed in the spring of this year, we realized that this might not be possible.

6. We began searching for an attorney as soon as we realized we would probably need to file all the petitions we could get in order to qualify for the ballot, about June 1, 1976.

7. Since early June we have simultaneously pursued two approaches 1) this litigation and 2) we

have contined to concentrate on the larger towns with a view to filing our most readily available petitions.

8. We now find that we have approximately 25,000 signatures, but, without relief from the concededly unnecessary and burdensome verification and filing systems we will only be able to file about 16,000 of them.

9. Given that some of the signatures will undoubtedly be invalidated for a variety of technical reasons, it is not likely that the 16,000 signatures we can file will produce 14,093 valid, unduplicated signatures. However, from past experience I would estimate that if all 24,000 signatures are filed, there will probably be sufficient numbers validated to secure a place on the ballot. Thus the conclusion we drew and acted promptly upon almost three months ago seems to be verified by subsequent experience.

This affidavit is being made to support a motion for new trial under Rule 59(a)(2), Federal Rules of Civil Procedure.

_____

Joelle Fish n

Sworn to and subscribed before me this day of August, 1976.

_____

Commissioner of the Superior Court

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of September, one thousand nine hundred and seventy-six.

Joelle Fishman, Peter Gagyi, Gus Hall, and Jarvis Tyner,

Plaintiffs-Appellants,

v.

Gloria Schaffer, in her capacity as Secretary of the

It is hereby ordered that upon consideration of the motion made herein by counsel for the

appellant

September 2, 1976 for a stay pending appeal and a preference, that the motion for a stay pending appeal is denied and that the motion for a preference is granted.

It is further ordered that appellants will serve and file their brief on or before September 17,1976, appelles will file their brief on or before 4:00 P. M. on September 20, 1976. The argument of their

appeal will be heard during the week of September 20, 1976. The briefs may be typewritten.

s/ Robert P. Anderson
Robert P. Anderson

s/ Walter R. Mansfield
Walter R. Mansfield

s/ William H. Mulligan
William H. Mulligan,

Circuit Judges

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of September, one thousand nine hundred and seventy-six.

Present:

HON. STERRY R. WATERMAN
HON. LEONARD P. MOORE
HON. WILLIAM H. TIMBERS

Circuit Judges.

JOELLE FISHMAN, PETER GAGYI, GUS HALL AND JARVIS TYNER,

Plaintiffs-Appellants,

vs.

GLORIA SCHAFFER, in her capacity as Secretary of the State of the State of Connecticut and EVELYN GOODWIN, in her capacity as Town Clerk of the Town of Litchfield, Connecticut,

Defendants-Appellees.

76-7436

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for

the said District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

s/ Sperry R. Waterman
SPERRY R. WATERMAN

s/ Leonard P. Moore
LEONARD P. MOORE

s/ William H. Timbers
WILLIAM H. TIMERS

Circuit Judges

CERTIFICATE OF SERVICE

This is to certify that on or before the 28th day of October, 1976, 3 copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit and Appendix were mailed, first class postage prepaid, to each of the following counsel of record: Daniel Schaefer, Esq., Assistant Attorney General, 30 Trinity Street, Hartford, Connecticut, counsel for respondent Gloria Schaffer, and David Losee, Esq., Connolly, Holtman and Losee, 4 North Main Street, West Hartford Connecticut, counsel for respondent Evelyn Goodwin.

FRANK COCHRAN

Sec. 9-452. Time for making nominations. All minor parties nominating candidates for any elective office shall make such nominations at least eight weeks prior to the day of the election at which such candidates are to be voted for in the case of state or district office, and five weeks prior to the day of the election at which such candidates are to be voted for in the case of municipal office. A list of nominees in printed or typewritten form shall be certified by the presiding officer of the committee, meeting or other authority making such nomination and shall be delivered by such presiding officer to the secretary of the state, in the case of state or district office, not less than forty-nine days prior to the day of the election, and to the clerk of the municipality, in the case of municipal office, not less than thirty-two days prior to the day of the election. The clerk of such municipality shall promptly verify and correct the names on any such list filed with him in accordance with the registry list of such municipality and endorse the same as having been so verified and corrected.

(November, 1955, S. N106; 1958 Rev., S. 9-128; 1961, P.A. 202; 1963, P.A. 17, S. 76.)

C

PETITIONING PARTIES

Sec. 9-453. Petition requirements. Section 9-453 is repealed.

(1949 Rev., S. 1044; 1953, S. 569d; 1957, P.A. 410, S. 1; 1958 Rev., S. 9-72; 1959, P.A. 476, S. 1; 675, S. 1; 1963, P.A. 17, S. 77; 1971, P.A. 806, S. 1.)

Former section cited. 10 CS 210; 16 CS 5.

Sec. 9-453a. Petition form. Each petition for nomination for elective office shall be on a form prescribed and provided by the secretary of the state. The secretary of the state shall give to any person requesting such form the number of pages requested by such person or the number which the secretary deems sufficient, provided the secretary of the state shall give to any person requesting such form, pages sufficient to accommodate at least three times the number of signatures required on the particular nominating petition.

(1971, P.A. 806, S. 2.)

Sec. 9-453b. Application. The secretary shall not issue any nominating petition forms unless the person requesting the same makes a written application therefor, which application shall contain the following: (1) The name or names of the candidates to appear on such nominating petition, compared by the town clerk of the town of residence of each candidate with his name as it appears on the last-completed registry list of such town, and verified and corrected by such town clerk or in the case of a newly admitted elector whose name does not appear on the last-completed registry list, the town clerk shall compare his name as it appears on his application for admission and verify and correct it accordingly; (2) a signed statement by each such candidate that he consents to the placing of his name on such petition, and (3) the party designation, if any, which shall consist of not more than three words and not more than twenty letters and which shall not incorporate the name of any major political party. An applicant for petition forms who does not wish to specify a party designation shall so indicate on his application for such forms and his application, if so

marked, shall not be amended in this respect. The secretary of the state shall not issue such forms (1) unless the application for forms in behalf of a candidate for the office of presidential elector is accompanied by the names of the candidates for president and vice-president whom he represents and includes the consent of such candidates for president and vice-president; (2) unless the application for forms in behalf of governor or lieutenant governor is accompanied by the name of the candidate for the other office and includes the consent of both such candidates; and (3) if petition forms have previously been issued on behalf of the same candidate for the same office unless the candidate files a written statement of withdrawal of his previous candidacy with the secretary of the state.

(1971, P.A. 806, S. 3.)

Sec. 9-453c. When single petition may be used. The names of any or all candidates under the same party designation for state offices, as defined by section 9-372, and for the office of presidential elector may be included in one nominating petition, but the name of no candidate for any other office shall be included therein, provided the names of any or all candidates under the same party designation for at-large municipal offices to be filled at a municipal election may be included in one nominating petition.

(1971, P.A. 806, S. 4.)

Sec. 9-453d. Number of signatures. Each petition shall be signed by a number of qualified electors equal to one per cent of the votes cast for the same office or offices at the last-preceding election, or the number of signatures prescribed by section 9-380 with regard to newly-created offices. "Votes cast for the same office at the last-preceding election" means, in the case of multiple openings for the same office, the total number of electors voting at the last-preceding election at which such office appeared on the ballot label.

(1971, P.A. 806, S. 5; P.A. 74-2.)

Sec. 9-453e. Circulator. Each circulator of a nominating petition page shall be an elector of a town in this state and eligible to vote for all candidates listed on such petition. Any individual proposed as a candidate in any nominating petition may serve as circulator of the pages of such nominating petition.

(1971, P.A. 806, S. 6.)

Sec. 9-453f. Signature pages. Before any signatures may be obtained on a petition signatures page, above the space provided for signatures shall be indicated the party designation, if any, the name and address of the candidate, the office sought, the election and the date thereof, and the town and district, if such is the case, in which such petition page is to be circulated. Such indication may not be altered or amended after any person has signed the page. Each page of a nominating petition shall contain the names and street addresses of the signers. No page of a nominating petition shall contain the names of electors residing in different municipalities and signatures on any page thereof which has been certified by the clerks of two or more towns shall not be counted by the secretary of the state.

(1971, P.A. 806, S. 7.)

Sec. 9-453g. False signing. Any person who signs a name other than his own

to a nominating petition filed under sections 9-453a to 9-453s, inclusive, or section 9-216 shall be fined not more than one hundred dollars or imprisoned not more than one year or both.

(1971, P.A. 806, S. 8.)

Sec. 9-453h. Withdrawal of signatures. Any signer of a nominating petition may withdraw his signature therefrom at any time up to ten weeks prior to the election by sending a written notice of such withdrawal to the candidate or candidates named in such petition and by sending a copy of such notice to the secretary of the state at least ten weeks prior to such election. Such written notice and the copy thereof shall be sent by registered or certified mail.

(1971, P.A. 806, S. 9.)

Sec. 9-453i. Submission to town clerk. Each page of a nominating petition shall be submitted by the person who circulated the same to the town clerk of the town in which the signers reside at least nine weeks prior to the election.

(1971, P.A. 806, S. 10.)

Sec. 9-453j. State ents by town clerk and circulator. At the time a petition page is submitted to the town clerk of the town in which it is circulated, such page shall contain a statement signed by the town clerk of the town in which the circulator is an elector attesting that the circulator is an elector in the town and setting forth his residence address therein and that he is entitled to vote at the election for the office for which such candidacy is being filed. Any town clerk shall forthwith complete said statement upon request by a circulator prior to the time when the petition page is filed with the town clerk of the town in which it was circulated. Each page of a nominating petition submitted to the town clerk and filed with the secretary of the state under the provisions of sections 9-453a to 9-453s, inclusive, or section 9-216 shall contain a statement as to the authenticity of the signatures thereon, signed under penalties of false statement, by the person who circulated the same setting forth such circulator's address and the town in which such circulator is an elector and stating that each person whose name appears on such page signed the same in person in the presence of such circulator and that either the circulator knows each such signer or that the signer satisfactorily identified himself to the circulator. Any false statement committed with respect to such statement shall be deemed to have been committed in the town in which the petition was circulated.

(1971, P.A. 806, S. 11.)

Sec. 9-453k. Duties of town clerk. (a) The town clerk shall not accept any page of a nominating petition unless the circulator thereof signs in his presence the statement as to the authenticity of the signatures thereon required by section 9-453j.

(b) The town clerk shall certify on each such page that the circulator thereof signed such statement in his presence and that either he knows the circulator or that the circulator satisfactorily identified himself to the town clerk.

(c) The town clerk shall forthwith give to each circulator submitting a page or pages of a nominating petition a receipt indicating the number of such pages so submitted and the date upon which such pages were submitted.

(d) Such town clerk shall certify on each such page the date upon which it was submitted to him and the number of names of electors on such petition page, which names were on the registry list last-completed or are names of persons admitted as electors since the completion of such list. In the checking of signatures on such nominating petition pages, the town clerk shall reject any name if such name is not the name of an elector as specified above. Such rejection shall be indicated by placing an "R" before the name so rejected. Such clerk may place a check mark before each name appearing on such registry list or each name of a person admitted as an elector since the completion of such list, but shall place no other mark on such page except as provided in this section.

(1971, P.A. 806, S. 12.)

Sec. 9-453l. Delegation of signature check to registrars. Any town clerk may delegate his duty to check the names of signers with names of electors on the registry list pursuant to section 9-453k to the registrars of voters in his town, if the registrars consent, and the registrars shall complete the required certifications with respect thereto on the petition, provided the registrars shall execute a receipt for such pages upon receipt thereof stating the number of pages and provided such checking of names by the registrars shall take place in the office of the town clerk or in the office of the registrars of voters if they have an office. After making the required certifications, the registrars shall deliver the petition pages to the town clerk.

(1971, P.A. 806, S. 13.)

Sec. 9-453m. Signatures, effect of variations. The use of titles, initials or customary abbreviations of given names by the signer of a nominating petition shall not invalidate such signature if the identity of the signer can be readily established by reference to the signature on the petition and the name of a person as it appears on the last-completed registry list at the address indicated or of a person who has been admitted as an elector since the completion of such list.

(1971, P.A. 806, S. 14.)

Sec. 9-453n. Date for filing with secretary. Any town clerk receiving any page of a nominating petition under sections 9-453a to 9-453s, inclusive, or section 9-216 shall complete such certifications as specified herein and shall file each such nominating petition page with the secretary of the state within three weeks after it was so submitted to him.

(1971, P.A. 806, S. 15.)

Sec. 9-453o. Approval of petitions. (a) The secretary of the state may not count for purposes of determining compliance with the number of signatures required by section 9-453d the signatures certified by the town clerk on any petition page filed under sections 9-453a to 9-453s, inclusive, or 9-216 if: (1) The name of the candidate, his address or the party designation, if any, has been omitted from the face of the petition; (2) the page does not contain a statement by the circulator as to the authenticity of the signatures thereon as required by section 9-453j or upon which such statement of the circulator is incomplete in any respect; or (3) the page does not contain the certifications required by sections 9-453a to 9-453s, inclusive, by the town clerk of the town in which the signers reside. The town clerk shall cure any omission on his part by signing

any such page at the office of the secretary of the state and making the necessary amendment or by filing a separate statement in this regard, which amendment shall be dated.

(b) The secretary of the state shall not approve any nominating petition if signatures counted and certified on approved pages are insufficient under section 9-453d.

(c) The secretary of the state may approve a nominating petition received under section 9-453k prior to the tenth week before the election but not earlier than the final date for endorsement by a major party for the office specified in the petition except such approval shall be withdrawn if sufficient signatures are withdrawn under section 9-453h.

(1971, P.A. 806, S. 16.)

Sec. 9-453p. Withdrawal of candidacy. A petitioning candidate may withdraw by filing an affidavit of withdrawal signed and sworn to by said candidate with the secretary of the state and, in the case of a municipal office, by also filing a copy with the town clerk. The secretary of the state shall forthwith notify the appropriate town clerks of such withdrawal in the case of a state or district office.

(1971, P.A. 806, S. 17.)

Sec. 9-453q. Use of party levers for petitioning candidates. The party levers on each voting machine shall be locked and covered so as to prevent straight-ticket voting for petitioning candidates not entitled to a party designation on the ballot label, except that a party lever shall be operative to permit such voting for petitioning candidates entitled to a party designation.

(1971, P.A. 806, S. 21.)

Sec. 9-453r. Ballot labels. A separate row on the ballot shall be used for a petitioning candidate whose name is contained in a petition approved pursuant to section 9-453o, bearing a party designation. A separate row shall be used for the petitioning candidates whose names are contained in petitions approved pursuant to section 9-453o, bearing the same party designation. The order of such party designations shall be as uniform as may be based on the geographical jurisdiction of the offices to be voted upon. On the horizontal lines below the line or lines so used for candidates, if any, who are so entitled to a party designation on the voting machines, shall be placed, in the appropriate office columns, the names of candidates not entitled to a party designation on the voting machine, precedence as to row being given to the candidate whose name appears in the first petition requested provided it shall be properly approved in accordance with section 9-453o. The party lever on each line or lines in which such a candidate's name appears who is not entitled to a party designation shall be covered and the cover labeled "Petitioning Candidates," the print of which shall correspond to that used for party designations on operative party levers.

(1971, P.A. 806, S. 22; 1972, P.A. 27, S. 1.)

Sec. 9-453s. Vacancies in candidacies. Ballot label. Vacancies in candidacies occurring after all nominating petitions have been approved under section 9-453o, shall not cause the position of any candidate's name on the ballot label to be changed to another position unless a blank row on the machine results

from such vacancy or vacancies in which case the position of candidates appearing on lines under the blank row may change if the consent of all candidates involved in such a change is filed in the secretary of the state's office prior to the time for printing and filing sample ballot labels with said secretary. The name of any candidate whose candidacy has been vacated shall not appear on the ballot label. The voting machine pointer over each position where no candidate's name appears shall be locked so that no vote can be cast in that position.

(1971, P.A. 806, S. 23.)

Sec. 9-454. Petition form. Signatures. Section 9-454 is repealed.

(1949 Rev., S. 1044; 1953, S. 569d; 1957, P.A. 410, S. 1; 1958 Rev., S. 9-72; 1959, P.A. 476, S. 1; 675, S. 1; 1963, P.A. 17, S. 77; February, 1965, P.A. 600, S. 2; 1967, P.A. 856; 1969, P.A. 715; 1971, P.A. 806, S. 1.)

Sec. 9-455. Circulation and filing of petition. Section 9-455 is repealed.

(1949 Rev., S. 1044; 1953, S. 569d; 1957, P.A. 410, S. 1; 1958 Rev., S. 9-72; 1959, P.A. 476, S. 1; 675, S. 1; 1963, P.A. 17, S. 79; 113; 1971, P.A. 806, S. 1.)

Sec. 9-456. Town clerk's duties. Section 9-456 is repealed.

(1949 Rev., S. 1044; 1953, S. 569d; 1957, P.A. 410, S. 1; 1958 Rev., S. 9-72; 1959, P.A. 476, S. 1; 675, S. 1; 1963, P.A. 17, S. 80; 1971, P.A. 806, S. 1.)

Sec. 9-457. Platform statement required, when. Section 9-457 is repealed.

(1949 Rev., S. 1044; 1953, S. 569d; 1957, P.A. 410, S. 1; 1958 Rev., S. 9-72; 1963, P.A. 17, S. 81; 1971, P.A. 806, S. 1.)

Sec. 9-458. False signing of petition. Section 9-458 is repealed.

(1963, P.A. 343; 1971, P.A. 806, S. 1.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. [redacted] 76-599

JOELLE FISHMAN, PETER GAGYI,
GUS HALL and JARVIS TYNER,
Petitioners,

v.

GLORIA SCHAFFER, in her capacity as Secretary of the State of the State of Connecticut and EVELYN GOODWIN, in her capacity as Town Clerk of the Town of Litchfield, Connecticut,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT SECRETARY OF THE STATE OF CONNECTICUT IN OPPOSITION

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BRIEF FOR RESPONDENT SECRETARY OF THE STATE OF CONNECTICUT IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

Should not a petition for writ of certiorari be denied where the District Court had found that the plaintiffs had unjustifiably delayed in bringing an elections suit so as to prejudice the State's vital interest in the authenticity of petition signatures?

STATEMENT OF THE CASE

On July 2, 1976, plaintiffs-petitioners,[1] hereinafter referred to as the petitioners, brought suit in United States District Court for the District of Connecticut challenging the constitutionality of a portion of this state's election laws. Petitioners' attack was aimed at only those sections of 9-453(a) et seq. which required the circulators of nominating petition signature pages to appear, in person, before the town clerk of the signer of the petition page and swear, in accordance with Section 9-453(j), Conn. Gen. Stat., that:

> ". . . each person whose name appears on such page signed the same in person in the presence of such circulator and that either the circulator knows each such signer or that the signer satisfactorily identified himself to the circulator."

The case was advanced on the docket and was heard on August 4, 1976 by a three-judge District Court. Argument was treated as one on the merits based on the cross motions for summary judgment.

On August 19, 1976, the Court issued its decision. It recognized that Connecticut has "one of the least demanding schemes for enabling potential candidates to gain a place on the ballot." (Petitioners' Appendix, A.3) The Court, however, did express serious concern for the petitioners' narrow claim as to the filing requirement, but found it unnecessary to rule on the merits. Instead, based upon affidavits and official documents from the Secretary of the State's office, it found that the petitioners had delayed unjustifiably in bringing this suit and were therefore barred by the equitable doctrine of *laches*.

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[1]Plaintiffs Fishman and Gagyi were petition circulators for plaintiffs Hall and Tyner, who were the Presidential and Vice-Presidential candidates of the Communist Party in the 1976 and 1972 presidential elections.

An appeal was taken from this decision to the United States Court of Appeals for the Second Circuit, wherein petitioners sought, (1) an expedited appeal and (2) an injunction pendng appeal. The injunctive relief was denied but an expedited hearing on the merits was ordered. Argument was heard on September 24, 1976 at which time the judgment of the District Court was affirmed unanimously.

Petitioners then applied for an injunction pending appeal to Mr. Justice Marshall, Circuit Justice. In a written decision dated October 1, 1976, Mr. Justice Marshall denied petitioners' application for injunctive relief. (A. pp. 3a-8a).[2] A re-application for injunctive relief was then presented to Mr. Justice Stewart. It was denied on October 4, 1976, without opinion.

ARGUMENT

A.

THE EQUITABLE DOCTRINE OF *LACHES* WAS PROPERLY INVOKED BY THE DISTRICT COURT.

A review of the long standing principles governing *laches*, when viewed in light of the facts surrounding this litigation leads to one conclusion: the District Court exercised sound discretion by invoking the equitable doctrine of *laches* to bar petitioners from pursuing their remedies.

Laches is an equitable doctrine based on the twofold notion of (1) an unreasonable delay of a party in pursuing rights that were known or should have been known, and (2) prejudice resulting from the delay. *Southern Pacific Railway Co.* v. *Bogert*, 250 U.S. 483, 488-490 (1918); *Johnston* v. *Standard Mining Co.*, 148 U.S. 360, 370 (1893). Further, the

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[2]Unless otherwise indicated, these references refer to the Appendix of Respondent, Gloria Schaffer.

public interest, intervening equities of third parties and the rule of clean hands may all operate to raise the bar of *laches* against a dilatory litigant. *Landell* v. *Northern Pacific Railway Co.*, 122 F.Supp. 253 (D.C. D.C. 1954), *aff'd.*, 223 F.2d 316 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 844, *reh. denied*, 350 U.S. 905 (1955).

1. Lack of Due Diligence.

The evidence before the District Court on this issue was compelling. The petitioners obtained the nominating petition forms on February 20, 1976. (Resp. Affidavit of September 9, 1976, filed in Court of Appeals, ¶ 13; Resp. Affidavit of August 2, 1976, filed in Dist. Ct., ¶ 3.) The forms indicated the existence of the certification requirement now challenged. In addition, instructions outlining the certification requirement and containing copies of the statutes now attacked were also provided that date. (Resp. Affidavit of September 9, 1976, ¶ 13.) Furthermore, the consent of the candidacy for Gus Hall, the Communist Party presidential candidate, was signed as early as January 21, 1976, prior to the alleged date of his nomination on February 18, 1976. (See consent form attached to Resp. Affidavit of August 2, 1976.) Petition forms could have been obtained as early as November 6, 1975. (Resp. Affidavit of August 2, 1976, ¶ 4.)

In addition, the Communist Party had unsuccessfully sought to qualify as a petitioning party in 1972, and thus the party organizers were certainly on notice as to the petition nominating procedure in Connecticut which is the same now as it was then. It should require little, if any, citation of authority for the proposition that the Communist Party itself could have instituted suit prior to the alleged date of its

actual nominations.[20] It is further noted that petitioner Fishman[3] qualified as a petitioning party candidate for Congress in 1974, under the same circulation and certification requirements. (Resp. Affidavit of September 9, 1976, ¶¶ 11 and 12.) Suffice it to say that the requirements of the present statutes did not come to the petitioners as a bolt from the blue. The petitioners claimed that they had waited until June of 1976 before thinking about suit because they had first hoped to obtain all the necessary signatures from the larger cities in Connecticut. First, it is noted that when specifically asked for the reasons for the delay by both Judge Blumenfeld and Judge Newman in the District Court, they did not offer this as an excuse. Furthermore, they did not provide any affidavit or other written claim to this effect prior to the issuance of the Memorandum of Decision of the lower Court. It was only in their motion for a new trial that this representation was first made.

The petitioners' failure to seek relief in a timely manner can only be attributed to lack of due diligence, to say the very least. In effect, what we are now being told is that the petitioners decided to take a chance and gamble that the necessary signatures could be obtained under existing procedures. Only when the election grew near and the petitioners realized that they might well be unsuccessful in their petition campaign did they belatedly turn to the Court for the extraordinary relief requested.

It is important to note that the District Court's finding in this respect is fully supported by the case law which we maintain would make the present petition bordering on the frivolous. In *Socialist Labor Party* v. *Rhodes*, 393 U.S. 23 (1968),

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[20]See *infra*, pp. 11-13.

[3]At the time this suit was brought, plaintiff Fishman was executive secretary of the Communist Party in Connecticut. (Petitioners' Brief, p. 3).

a companion case to *Williams* v. *Rhodes*, 393 U.S. 23 (1968),[4] the Supreme Court denied relief to the Socialist Labor Party on the following grounds:

> ". . . At that hearing Ohio represented to Mr. Justice Stewart that the Independent Party's name could be placed on the ballot without disrupting the state election, but if there was a long delay, the situation would be different. It was not until several days after that hearing was concluded and after Mr. Justice Stewart had issued his order staying the judgment against the Independent Party that the Socialist Labor Party asked for similar relief. The State objected on the ground that at that time it was impossible to grant the relief to the Socialist Labor Party without disrupting the process of its elections; accordingly, Mr. Justice Stewart denied it relief, and the State now repeats its statement that relief cannot be granted without serious disruption of election process. *Certainly at this late date it would be extremely difficult, if not impossible, for Ohio to provide still another set of ballots. Moreover, the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens, for example, absentee voters. . . .*" (Emphasis added.)
>
> 393 U.S. at 34-35.

[4]Throughout the course of this litigation petitioners have repeatedly and mistakenly placed reliance on *Williams* v. *Rhodes, supra,* in support of their claims for extraordinary relief. Most conspicuously, however, they have failed to address themselves to *Socialist Labor Party* v. *Rhodes, supra,* which is more closely in point. Two observations need be made concerning petitioners' application of *Williams,* (Petitioners' Brief, p. 9). First, in that case the questions of authenticity of signatures and significant modicum of support were not in issue. The Court apparently was satisfied that the state's interest in those regards were sufficiently protected, in light of the facts surrounding that case. Secondly, the State of Ohio admitted that Mr. Wallace could be placed on the ballot without disrupting the entire election process. The evidence in the present case, however, was exactly to the contrary on both these points.

This decision was followed in *Sullivan* v. *Grasso,* 292 F.Supp. 411 (D. Conn. 1968), a case involving a challenge to the Connecticut write-in vote laws. Judge Smith in dismissing the Complaint noted that the action came "at the eleventh hour, after failure to take advantage of the petition procedures, . . ." 292 F.Supp. at 413.

It is also noted that Chief Judge Clarie of the U.S. District Court for Connecticut observed in his Ruling denying a motion for preliminary injunction in another elections case:

> ". . . The four and one-half months which have elapsed between the approval and filing of the amended party rules and the filing of this action may support the equitable defense of laches, *cf. Gillespie & Co.* v. *Weyerhaeuser Co.*, slip op. at 2871 (2d Cir. April 1, 1976). . . ."
>
> *Armstrong, et al* v. *Schaffer, et als, Ruling On Motion For Preliminary Injunction,* Civ. No. H 76-136, D. Conn., May 3, 1976.

Thus, it was unreasonable to expect that the courts would undertake a drastic revision of the Connecticut election laws, particularly in light of the United States Supreme Court's admonition in *Socialist Labor Party* v. *Rhodes, supra.*

2. Resulting Prejudice.

We now turn to the second element involved in *laches,* resulting prejudice and injury. One essential interest of the State, considered by the District Court, was the requirement that petitioning parties demonstrate a minimum level of support before being placed on the general ballot. More specifically, there was also an important interest in ensuring that this support be shown in an honest manner, free from fraud. As the Supreme Court has noted:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot — the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."
>
> *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971).

The District Court was made well aware by both brief and oral argument that the Connecticut Legislature had inserted the certification requirement involved to prevent recurrence of demonstrated abuses and irregularities in the circulation of nominating petitions. Connecticut General Assembly 1957 House Proceedings, Volume 7, Part 4, pp. 2313-14; Joint Standing Committee Hearings, Connecticut General Assembly 1957, p. 111.

It was apparent to the Court below that an effective and administratively feasible substitute remedy to protect these interests could not be devised in time for this year's elections due to "the unexplained and unjustifiable delay" on the petitioners' part. The statutory deadline for submission of nominating petitions to the Town Clerks was August 30, 1976 pursuant to Section 9-453i, Conn. Gen. Stat. The Complaint, however, was not filed in the District Court until July 2, 1976. The hearing before the three-judge District Court was held on an expedited basis on August 4, 1976. The Decision was filed on August 19, 1976.

It is noted that the proposals of the petitioners for delivery of the petitions to the Town Clerks would evidently have dispensed with the requirement for personal certification. The public would then have been exposed to the problem of alterations, subsequent to the notarization but before delivery, which was specifically why the present provision was enacted. The other proposal of the petitioners for delivery of the petitions to the Secretary of the State who would then have assumed the duty of distribution would have imposed severe administrative burdens on that office.[5] These valid administrative considerations on the part of the State of Connecticut were most properly considered by the District Court in this case. One of the leading decisions on this point is *Marston* v. *Lewis*, 410 U.S. 679 (1973). The Court there upheld a 50-day durational residency requirement of the State of Arizona for non-presidential elections. This was notwithstanding the Court's prior ruling in respect to 30 days in the case of *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

This decision was followed in *Burns* v. *Fortson*, 410 U.S. 686 (1973). The Court upheld a similar 50-day prior registration requirement contained in the Georgia Election Code, stating:

> "The State offered extensive evidence to establish 'the need for a 50-day registration cut-off point, given the vagaries and numerous requirements of the Georgia election laws.' Plaintiffs introduced no evidence. On the basis

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[5]The correctness of the District Court's decision on this issue is reflected in an affidavit submitted in support of respondents' brief to the Court of Appeals, wherein Robert J. Gallivan, Town and City Clerk of the City of Hartford, Connecticut, detailed the substantial number of hours and individuals needed for just receiving petitions, counting the number of signatures as well as pages and providing receipts for even a relatively small number of petition pages. This burden would probably have devolved upon the Secretary of the State, only to have been magnified on a state wide basis, had the plaintiffs prevailed.

Further, by affidavit dated August 9, 1976 submitted to the District Court in support of respondent's Motion for Summary Judgment, Henry S. Cohn, Elections Attorney and Director of the Elections Division of the Secretary of the State's Office testified that in the successful petition effort by the George Wallace Party in 1974 at least one thousand, seven hundred and thirty (1730) nominating petition signature pages of that party alone were submitted to his office by the town clerks of at least one hundred and fifteen (115) towns preceding the general election of 1974. All these pages would have had to have been initially processed, receipted for and then distributed by the Secretary of the State without any prior administrative preparation according to the plaintiffs' demands.

of the record before it, the District Court concluded that the State had demonstrated 'that the 50-day period is necessary to promote . . . the orderly, accurate, and efficient administration of state and local elections, free from fraud.' (Footnote omitted.) Although the 50-day registration period approaches the outer constitutional limits in this area, we affirm the judgment of the District Court. What was said today in Marston v. Lewis, 410 U.S. 679, at 681, 93 S.Ct 1211, at 1213, 35 L.Ed. 2d 627, is applicable here."

Id. at 687-688.

See also: American Party of Texas v. *White*, 415 U.S. 767 (1974), n. 18 at 788.

Furthermore, this Court ruled in *Reynolds* v. *Sims*, 377 U.S. 533 (1964):

"[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by MR. JUSTICE DOUGLAS, concurring in Baker v. Carr, 'any relief accorded can be

fashioned in the light of well-known principles of equity.'"

Id. at 585.

See also Burford v. *Sun Oil Co.*, 319 U.S. 315, 317-318 (1943).

In view of these well-established principles and the substantial evidence before the District Court, that Court was more than justified in concluding that it was too late, as a practical matter to afford relief and still protect the legitimate interests of the State of Connecticut in efficient administration and prevention of fraud.[6]

B.

RELATED EQUITABLE CONSIDERATIONS FULLY SUPPORT THE DISTRICT COURT'S DETERMINATION.

Petitioners, in their brief, advance a number of other theories which, they claim, demonstrate the manner in which the District Court misapplied the *laches* doctrine.

First, petitioners argue, the requirements of ripeness, standing and case or controversy were lacking until February 20, 1976, when the nominating petition pages were taken out. (Petition, p. 8.) As to the "ripeness" allegation, petitioners cite no authority for this proposition. In fact, as previously noted, given the history of petitioners' efforts since 1972 to gain

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[6]It is noted there were at least three (3) other state wide petitioning parties at the time of the District Court's decision. In the event that the District Court had issued an injunction, these other parties might well have demanded the same relief on the basis of *stare decisis* and thus the severe administrative burdens outlined would have been multiplied.

ballot access under this same statutory scheme, the facts compel an entirely different conclusion.

Concerning the issues of standing and case or controversy, petitioners cite a number of cases which can be easily distinguished. By way of example, petitioners cite *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972) in support of their case or controversy argument. In that case, however, the Ohio legislature extensively revised the statutes being litigated, rendering the appeal moot. A loyalty oath requirement, with which the appellant Socialist Labor Party had complied, went untouched by the revision. Examining that portion of the statute, the Court noted that the pleadings of the appellant failed,

> ". . . to allege that the requirement has in any way affected their speech or conduct, or that executing the oath would impair the exercise of any right that they have as a political party or as members of a political party."
>
> *Id.* at 587.

Since appellants did not allege and could not show any personal harm or injury, the Court refused to pass on the legal sufficiency of the loyalty oath requirement since, "the law's future effect remains wholly speculative." *Id.* at 589.

Even assuming *arguendo* that February 20, 1976 was the magical date, one other point should be noted. At the time this matter was presented to the District Court, petitioners neither briefed nor orally argued deficiencies of standing, case or controversy or ripeness as reasons for the long delay in bringing this action. Indeed, Justice Marshall, in his decision denying petitioners' request for injunctive relief, specifically noted that petitioners could have instituted suit earlier:

"In addition to these distinctions on the merits, there

are several additional factors militating against the extraordinary relief sought. First, the plaintiffs delayed unnecessarily in commencing this suit. The statute is not a new enactment and plaintiffs have, in fact, utilized it before. In 1972, the Communist Party unsuccessfully circulated petitions for presidential electors. And in 1974, Joelle Fishman, one of the plaintiffs-electors in this suit, successfully qualified as a petitioning candidate for Congress. *Thus, plaintiffs were sufficiently familiar with the statute's requirements and could have sued earlier.* (Emphasis added.)

(A. 8a).

Petitioners next argue that *laches* is an affirmative defense, and as such must be pleaded and proven by the party asserting it. In response to petitioners' Complaint of July 2, 1976, this respondent filed an answer including defenses under Rule 12(b), Federal Rules of Civil Procedure. Included therein was a defense that "The Complaint failed to state a claim upon which relief can be granted." In support of that defense, respondent, by way of both written brief and oral argument vigorously advanced the issue of *laches* before the District Court. At no point was an objection raised that this issue was improperly brought before the Court. Petitioners have, therefore, waived any objection that this defense was not properly pleaded. *Joyce* v. *L. P. Steuart, Inc.*, 227 F.2d 407 (D.C. Cir. 1955). Petitioners' implication that no facts were produced to support a defense of *laches* (Petition, p. 4) is untrue. Affidavits submitted to the District Court in support of respondent's Motion for Summary Judgment clearly set forth facts, which gave the District Court a substantial basis for its determination. In addition, the District Court judicially noticed that due to the imminence of the election, it would have been impossible to devise a remedy in time that would safeguard the legitimate interests of the state. As Justice

Marshall noted in his decision denying petitioners' request for injunctive relief:

> "The District Court, while sympathetic to this claim, did not rule on the merits, since it found plaintiffs' suit barred by laches. It noted that plaintiffs had tried and failed to qualify for a position on the ballot in a previous election. They were familiar with the statute and could have brought suit earlier. The delay meant that the legislature could not consider alternative filing requirements; instead, relief, if warranted, would have to be the drastic remedy of putting the candidates on the ballot, leaving the State with no protection of its interest in authenticity. Accordingly, the District Court dismissed the action. . . ."
>
> •
>
> (A. 5a).

Further, it is a long-standing and well-recognized principle that even where the issue of *laches* is not specifically pleaded as such, courts of equity will withhold relief from those who have failed to pursue their rights within a reasonable length of time. *Willard* v. *Wood*, 162 U.S. 502 (1896).[7]

Finally, petitioners state that

> "There is authority for the proposition that in a civil rights act case the District Court lacks discretion to deny relief where it finds the plaintiff to have established a right at trial, and relief is necessary to implement that right."

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[7]See generally, 2A *Moore's Federal Practice*, ¶ 12.09[2] n. 17 at 2295-6 (1975); *Latta, et al* v. *Western Inv. Co., et al*, 173 F.2d 99 (9th Cir. 1949), *cert. denied* 337 U.S. 940 (1949); *Sidebotham* v. *Robison*, 216 F.2d 816 (9th Cir. 1954) (*laches* need not be pleaded as affirmative defense where defect apparent on face of Complaint). *Cf. also Panhandle Eastern Piping Co.* v. *Parish*, 168 F.2d 238 (10th Cir. 1948) (general motion to dismiss properly raised issue of statute of limitations.)

They cite *Sostre* v. *Rockefeller*, 312 F. Supp. 863, 884 (SDNY 1970) (Motley, J.) *rev'd. in part, modified in part, aff'd. in part*, 442 F.2d 178, *cert. denied*, 404 U.S. 1049,[8] and *Henry* v. *Greenville Airport Commission*, 284 F.2d 631 (4th Cir., 1960).[9] This proposition is clearly inappropriate, however, since here, unlike the above-cited cases, no determination was made on the merits of petitioners' claims. (Petitioners' Appendix, p. A-14; Mr. Justice Marshall's ruling denying injunction pending appeal, (A. p. 5a).

Secondly, and of even greater importance are the well-known principles applied by the United States Supreme Court in *Socialist Labor Party* v. *Rhodes, supra*, and *Reynolds* v. *Sims, supra*. In the latter, as previously noted, it was specifically held that in dealing with an imminent election and complicated election laws, a Court "should act and rely upon general equitable principles. . . ." 377 U.S. at 585, *supra*.

C.

DECLARATORY JUDGMENT PROPERLY DENIED.

Much is made by the petitioners of the argument that even assuming injunctive relief was properly denied, a declaratory judgment should, nevertheless, have been granted. Great reliance is placed upon such decisions as *Steffel* v. *Thompson*, 415 U.S. 452 (1974). In that case it is true that declaratory relief was found appropriate, notwithstanding

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[8]Because of the reversal by the Court of Appeals of many of the broad orders for injunctive relief that had been issued by the District Court in the *Sostre* case, we feel that it is inaccurate to state that the District Court's decision had been reversed in part only "[o]n other grnds" as claimed by the petitioners. (Petition, p. 13).

[9]It should be further noted that the context of this case involved a finding by the District Court that blacks had been discriminated against. However, the court had also denied a preliminary injunction on the basis of lack of irreparable injury as well as the fact that an order would not maintain the status quo, but would instead change it. It was this reasoning which the Court of Appeals in its reversal had held to be an inadequate basis for denying relief.

the fact that an injunction was not warranted. However, that action involved a challenge to a state criminal statute where no state court proceedings were pending at the time. The only equitable requirement that was relaxed was that of demonstrating irreparable injury. Because this factor could not be shown, an injunction was held to have been properly denied. However, in permitting declaratory relief, the Court was careful to emphasize that there were no pending criminal proceedings, stating:

> "When no state proceeding is pending *and thus considerations of equity, comity, and federalism have little vitality,* the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief. . . ." (Emphasis added.)

Id. at 463.

The Court went at great lengths to reaffirm the doctrine in *Samuels* v. *Mackell*, 401 U.S. 66 (1971) that the same principles of equity, comity and federalism

> ". . . ordinarily would be flouted by issuance of a federal declaratory judgment when a state proceeding was pending, *since the intrusive effect of declaratory relief 'will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid.'* 401 U.S. at 72, 91 S. Ct., at 767. We therefore held in Samuels that, 'in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory

> judgment . . .' Id., at 73, 91 S. Ct., at 768." (Emphasis added.)

Id. at 462.

It is respectfully submitted that comparable principles of equitable jurisdiction and federalism which caution against disrupting a pending state court proceeding would also apply in the present situation. The same chaotic effect upon a state's electoral process in the face of impending election deadlines would obviously result even if the relief were labelled as only "declaratory." It is clear that a declaratory judgment could easily have a *res judicata* effect on the election laws in question. Secondly, a declaratory judgment or decree could be enforced by "further necessary or proper relief" pursuant to 28 U.S.C., § 2202. Both of these factors were noted by the Court in *Steffel, id.*, at 462, n. 11. These considerations were underscored by the subsequent decision in *Hicks* v. *Miranda*, —— U.S. ——, 95 S. Ct. 2281 at 2292 (1975), in which this Court declined to permit declaratory relief in respect to pending state criminal proceedings for these reasons.

Had a declaratory judgment been granted as demanded in the Complaint, the petitioners in all probability would have been the first to insist that the State petition laws had thus been invalidated for this year's election. It would then have been claimed that the Secretary of the State was obligated to process the unfiled petition pages on short notice, with no opportunity to prepare administratively beforehand. It was this burden that the petitioners had sought to thrust upon the respondent, Secretary of the State, throughout this litigation. In the alternative, they also had demanded that the Communist Party candidates be peremptorily placed on the ballot, without any further showing of support as required by state law. Had declaratory "relief" been granted, this argument would have undoubtedly been made with even greater outcry. It is evident, therefore, that the peti-

tioners pleas for declaratory relief rely on matters of label and form and not of substance. The Court, therefore, properly exercised its discretion in withholding a declaratory "remedy" as well as an injunctive decree itself.

CONCLUSION

It is clear that there are no special and important reasons for granting a writ of certiorari in this case, a writ which, of course, is not a matter of right but of sound judicial discretion. The decision by the District Court and its affirmance by the United States Court of Appeals for the Second Circuit are fully consistent with applicable rulings of this Court, including *Socialist Labor Party* v. *Rhodes, supra,* and *Reynolds* v. *Sims, supra.* There is absolutely no showing that the lower courts have departed from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision, within the meaning of Rule 19, Revised Rules of the Supreme Court.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in this case is completely without merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Barney Lapp, Attorney for the Respondent, Gloria Schaffer, Secretary of the State, State of Connecticut, certify that on the 10th day of December, 1976, I served a copy of the foregoing Brief by mailing, United States Mail, Postage Prepaid, to the following attorneys of record:

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APPENDIX

INDEX TO APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A–257

Joelle Fishman et al.
v.
Gloria Schaffer, Secretary of State of Connecticut, et al.
} Application for Injunction.

[October 1, 1976]

MR. JUSTICE MARSHALL, Circuit Justice.

This is an application to me as Circuit Justice for an injunction ordering officials of the State of Connecticut to place on the ballot for the November 2 election the names of the Communist Party candidates for President and Vice President of the United States, Gus Hall and Jarvis Tyner, respectively. Applicants[1] sought relief without success from a three-judge District Court for the District of Connecticut and, on appeal, from the Court of Appeals for the Second Circuit.[2] While there is no question of my power to grant such relief, Supreme Court Rule 51, *McCarthy* v. *Briscoe* (opinion of POWELL, J., in-Chambers, September 30, 1976), *Williams* v. *Rhodes*, 89 S. Ct. 1, 21 L. Ed. 2d 69 (opinion of STEWART, J., in-Chambers, 1968), it is equally clear that "such power should be used sparingly and only in the most critical and exigent circumstances." *Williams* v. *Rhodes, supra*, 89 S. Ct. at —, 21 L. Ed. 2d, at 70. Since this case does not meet that standard, I must deny the requested relief.

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[1] Applicants are two petition circulators (Fishman and Gagyi) and the Presidential and Vice Presidential candidates of the Communist Party (Hall and Tyner), for whose candidacy Fishman and Gagyi circulated petitions.

[2] In view of the District Court's denial of relief on equitable grounds without deciding the merits of the constitutional attack, plaintiffs properly sought review initially in the Court of Appeals. See *McCarthy* v. *Briscoe, supra*, n. 2; *MTM, Inc.* v. *Baxley*, 420 U. S. 799, 804 (1975).

Plaintiffs filed their complaint on July 2, 1976, attacking as unconstitutionally burdensome certain provisions of the Connecticut election law which apply to candidates seeking to get on the ballot by means of nominating petitions. They sought declaratory and injunctive relief against enforcement of only a small segment of this procedure—the prescribed method for filing the completed petitions. Conn. Gen. Stat. § 9-453.

In order to demonstrate a "significant modicum of support" *Jenness* v. *Fortson*, 403 U. S. 431, 432 (1971), Connecticut requires potential candidates to submit petitions signed by electors equal to one percent of the number who voted for the same office in the previous election. Conn. Gen. Stat. § 9-453d. The petitions are available immediately after the last state-wide election and do not have to be filed until nine weeks before the relevant election. Conn. Gen. Stat. § 9-453n. Thus, the numerosity and time requirements of the statute are, as the District Court observed, "markedly more favorable" to the potential candidate than are constitutionally required. District Court Slip op., at 3; see *Storer* v. *Brown*, 415 U. S. 724 (1974); *American Party of Texas* v. *White*, 415 U. S. 767 (1974); *Jenness* v. *Fortson*, 403 U. S. 431 (1971); Note, Developments in the Law-Elections, 88 Harv. L. Rev. 1111, 1123-1130 (1975).

As a means of assuring the authenticity of the signatures collected, the law requires that the circulator sign a statement under penalty of perjury that (1) each signer of a petition signed the petition in his or her presence, and (2) he or she either knows the signer, or the signer satisfactorily identified himself or herself to the circulator. This procedure must be performed personally before the Town Clerk in each town where any petition signer resides. Plaintiffs do not object to the need for the circulator to make the required statement. They claim, however, that the requirement that it be done personally in front of numerous Town Clerks necessitates so much travel that it is unconstitutionally

burdensome.[3] While acknowledging that the state has a valid and important interest in assuring the authenticity of the signatures and the eligibility of the signers, plaintiffs argue that this interest can be served in ways less burdensome to the circulators.

The District Court, while sympathetic to this claim, did not rule on the merits, since it found plaintiffs' suit barred by laches. It noted that plaintiffs had tried and failed to qualify for a position on the ballot in a previous election. They were familiar with the statute and could have brought suit earlier. The delay meant that the legislature could not consider alternative filing requirements; instead, relief, if warranted, would have to be the drastic remedy of putting the candidates on the ballot, leaving the State with no protection of its interest in authenticity. Accordingly, the District Court dismissed the action. The Court of Appeals, in an expedited appeal, affirmed without opinion.

Turning to the merits of the application, as I noted previously, the relief sought is extraordinary. So far as I am aware, a single Justice of this Court has ordered a State to put a candidate's name on the ballot only twice. *Williams* v. *Rhodes, supra; McCarthy* v. *Briscoe, supra.* This case lacks all the significant features warranting relief in those cases.

McCarthy presented "no novel issue of constitutional law."

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[3] Specifically, they object to those portions of Conn. Gen. Stat. §§ 9-453i and 453k (1976 Supp.) which require that:

1. "Each page of a nominating petition shall be submitted *by the person who circulated the same to the town clerk of the town in which the signers reside* . . . ." § 9-453i (1976 Supp.).

2. "The town clerk shall not accept any page of a nominating petition *unless the circulator thereof signs in his presence the statement* as to the *authenticity* of the signatures thereon required by section 9-453j." § 9-453k (a) (1976 Supp.).

3. "The town clerk shall *certify* on each such page that the circulator thereof signed such statement in his presence and that either he knows the circulator or that the circulator satisfactorily identified himself to the town clerk." § 9-453k (b) (1976 Supp.).

Slip op., at 4. In MR. JUSTICE POWELL's view, the Texas Legislature had adopted an "incomprehensible policy," amending its Election Code so as to preclude independent candidates for the office of President from qualifying for the general election ballot. Slip op., at 5. This deliberate refusal to provide access to independents was characterized by both the District Court and MR. JUSTICE POWELL as demonstrating an "intransigent and discriminatory position." *Ibid.* Thus, there was no question that Texas had clearly violated the constitutional requirements for ballot access.

In contrast, the constitutionality of the Connecticut statute is at best a close question. I have no doubt about the correct standard of review:

> "Whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discrimination . . . their validity depends upon whether they are necessary to further compelling state interests.
>
> . . . . .
>
> [The limitations must be] reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." *American Party of Texas*, v. *White*, *supra*, 415 U. S., at 780–781.

Nevertheless, there is little precedent dealing specifically with filing procedures. Indeed, the one case touching on the subject, *American Party of Texas* v. *White*, *supra*, suggests that a requirement more burdensome than Connecticut's—that all signatures be notarized at the time they are collected—is not unconstitutional, at least absent more proof of impracticability or unusual burdensomeness than was before the Court. *Id.*, at 787. Moreover, unlike the Texas law in *McCarthy* which provided no means of access whatever for an independent candidate, and the Ohio law which made it "virtually impossible" for a new political party to get on the ballot, *Williams* v. *Rhodes*, *supra*, 393 U. S., at 25, Connecticut has one of the more liberal ballot access statutes. Far from the

intransigence found in *McCarthy*, here the Connecticut Legislature apparently sought to deal rationally with abuses it had encountered in the petitioning process. See Connecticut General Assembly 1957. House Proceedings Volume 7, Part 4, pp. 2313–2314.

Furthermore, while there may be less burdensome ways to authenticate signatures, the fact remains that a number of groups have successfully used the Connecticut procedures. Since 1968, four petitioning parties have qualified on a statewide basis under the same procedures now attacked. Affidavit of Henry Cohn, Elections Attorney and Director of the Elections Division of the Secretary of State's Office, August 2, 1976. In addition, according to Mr. Cohn's later affidavit, as of September 17, 1976, it appeared that the U. S. Labor Party would qualify Presidential candidates this year. In view of this record showing that it is feasible to comply with the requirement under attack, plaintiffs' claims that the statute is unduly onerous become less compelling. See *American Party of Texas* v. *White*, *supra*, 415 U. S., at 779, 783–784. While I do not intimate that plaintiffs may not ultimately prevail on the merits,[4] I do conclude that unlike *McCarthy*, the question is too novel and uncertain to warrant a single Justice's acting unilaterally to strip the State of its chosen method of protecting its interests in the authenticity of petition signatures.

In addition to these distinctions on the merits, there are several additional factors militating against the extraordinary relief sought. First, the plaintiffs delayed unnecessarily in commencing this suit. The statute is not a new enactment and plaintiffs have, in fact, utilized it before. In 1972, the Communist Party unsuccessfully circulated petitions for pres-

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[4] I imply no view on the correctness of the dismissal of the action insofar as it seeks declaratory relief. Moreover, I note that that claim will not be rendered moot by the occurrence of the election or by our refusal to grant affirmative relief now. *American Party of Texas* v. *White*, *supra*, 415 U. S. at 770, n. 1; *Storer* v. *Brown*, 415 U. S. 724, 737, n. 8 (1974).

idential electors. And in 1974, Joelle Fishman, one of the plaintiffs-electors in this suit, successfully qualified as a petitioning candidate for Congress. Thus plaintiffs were sufficiently familiar with the statute's requirements and could have sued earlier. Moreover, defendants strongly oppose the relief sought, claiming that an injunction at this time would have a chaotic and disruptive effect upon the electoral process. Defendants' Response, at 1. The Presidential and Overseas Ballots have already been printed; some have been distributed. The general absentee ballots are currently being printed. *Id.*, at 2. This stands in marked contrast to the situation in *Williams* v. *Rhodes*, where Ohio agreed that the Independent Party could be placed on the ballot without disrupting the election. *Williams* v. *Rhodes*, *supra*, 21 L. Ed. 2d, at 70; *Williams* v. *Rhodes*, 393 U. S. 23, 35 (1968). It also differs from *McCarthy*, where it appears that Texas had neither printed nor distributed any ballots when the injunction was issued. Slip op., at 7 n. 4.

For these reasons, I conclude that the application should be denied.

It is so ordered.